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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

United States of America,

Plaintiff,

vs.

David Allen Harbour,

Defendant.

Case No. 2:19-cr-00898-DLR (DMF)

**DEFENDANT'S RESPONSE TO
GOVERNMENT'S MOTION TO
STRIKE (Doc. 575)**

Defendant David A. Harbour ("Harbour"), by and through undersigned counsel,
responds to the government's motion to strike. ("Motion").

ARGUMENT

I. Motion to Strike Defense Exhibits

Excluding evidence is an appropriate remedy for a discovery rule violation only
where the omission was willful and motivated by a desire to obtain a tactical advantage.
Taylor v. Illinois, 484 U.S. 400, 415, 108 S.Ct. 646, 98 L.Ed.2d 798 (1988); *United States*
v. Finley, 301 F.3d 1000, 1018 (9th Cir. 2002). The chain of events that created this issue

1 for the court did not arise from Defense Counsels' willful desire to gain a tactical
2 advantage. Far from it.

3 At the outset of our participation in this case, we said in open court that the
4 defense had a very large data base that prior counsel apparently thought should be
5 disclosed mostly through impeachment exhibits. Only one defense disclosure had been
6 made since the inception of the case in 2019. It is to be recalled that, when we entered
7 the case, Defendant had been incarcerated since the prior December and his lead lawyer
8 had actually been permitted to withdraw. The state of the case was in the midst of the
9 detention hearing that, with its *de novo* appeal, would remain ongoing for several months
10 longer. While the Defendant won the detention hearing, he could not bond out for reasons
11 of which the Court is aware.

12 After it became apparent that he would not be able to bond out, we petitioned the
13 Court to permit the Defendant access to a laptop, which was granted, and we began a
14 painstaking process of dealing with the professionals at Teris, which had been
15 maintaining a data base of approximately 800,000 documents since June 2016. That data
16 base was created when Snell & Wilmer attorney James Melendres had Teris image the
17 computers of David Harbour, Laura Purifoy, and Carol Hill.

18 Directed by our client's and our own search criteria, we began drawing documents
19 from the database. These would be placed on thumb drives and, with the kind cooperation
20 of CoreCivic authorities, the undersigned would drive them down to Florence and hand
21 them to the authorities who would then review the contents and within a day or two

1 deliver the jump drive to Harbour's supervisors who would make it available with the
2 laptop to which Harbour was granted 6 hours of time per day.

3 Harbour would review the documents alone and then, he and counsel would
4 discuss them both on the phone and in person. Selections for Rule 16 reciprocal
5 disclosure would be made and then the jump drives would be picked up by counsel, along
6 with the client's thoughts, after which the documents that were to be produced would be
7 reviewed again, Bates labeled, and supplied to the government. It was an unwieldy and
8 very time-consuming process. However, all the difficulties notwithstanding, we provided
9 substantial disclosures March 29, April 14, June 10 (2), then November 23, January 4,
10 January 13, January 26, and January 30 with a final production expected late January 31st.

11 Meanwhile, the government, after a similar 4-month hiatus of its own following a
12 production made on July 22, 2022, has made eight (8) new document productions since
13 November 18, 2022 and continuing on December 2, December 9, January 6, January 18,
14 January 23, January 28 and, most recently, January 30th. The government cannot make
15 the argument that Defendant's "late" disclosures should be struck while they themselves
16 engaged in identical conduct regarding disclosures.

17 Every time the government made a new production of documents, the new
18 production caused Defendants to have to review whether or not new Defense productions
19 were needed to respond to the ever-increasing of new government productions.

20 Meanwhile, the government proposed that all exhibits and documents would be
21 exchanged by January 31, 2023. We do not expect that the government did this for the
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1 Defense's benefit but, given the enormity of our task, we are grateful that the government
2 had proposed the late date.

3 Of even more importance is this: The government did not produce a proposed
4 Exhibit list at all November 29, 2022 and when it did, it contained only 390 exhibits.
5 When we asked how many exhibits the government intended to use, we were advised to
6 start our numbering at Exhibit 1000. This caused us to think that, perhaps another 610
7 exhibits would be coming. We heard nothing further about the exhibits from the
8 government until January 23, 2023, when the government expanded the exhibit list to
9 Exhibit 706, almost double.
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11 The government did not supply the exhibits and while it did supply many Bates
12 numbers, the exhibit list is notably missing enough Bates numbers that our staff has still
13 not been able to locate a number of the governments exhibits. In addition, the government
14 did not inform the defense as to the witnesses it intend to call until January 30, 2023.
15 Some of these names were new enough to us and that it caused us to need to add new
16 exhibits, which explains the production of January 30 and 31.
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18 Meanwhile, on January 26, having received the government's expanded list on
19 January 23rd, we supplied, with descriptions and Bates labeling a list of our Exhibits 1000
20 through 2120, all of which had been produced. While the government had likely
21 produced 80,000 documents since 2019, until November 29, 2022, and January 23, 2023,
22 the defense had absolutely no idea of which ones of the 80,000+ documents the
23 government intended to use as Exhibits. The exhibits were buried in the massive
24 production.
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1 It should be easily understood that the defense's exhibit list, in material part, had
2 to follow and be driven by the government's list. Considering that the government has the
3 complete burden of proof, we feel somewhat aggrieved that we are being asked to
4 shoulder the blame. Our task would have been easier had, first, the cumbersome
5 procedure for identification of potential defense exhibits not existed, and second, had the
6 government produced its entire exhibit list sometime earlier than just after Thanksgiving.
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8 In short, the deadline proposed by the government has been met. Just barely, but
9 the deadline has been met. Obviously, if the defense cannot use its Exhibits, the Defense
10 cannot possibly win the case. A check of the visitors log at CoreCivic will show that
11 most weeks the undersigned made at least one and often two visits to the facility and so,
12 there is certainly no delay to be attributed to the client. The supervisory personnel there
13 would likely concede that Harbour never missed a day with the laptop assisting counsel
14 in preparing the Defense. Given the circumstances, we do not know how we could have
15 done a better job.
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17 The government relies on *Taylor* to claim that "As in Taylor, Defendant's
18 eleventh-hour document disclosures were 'willful and blatant,' and 'the inference that he
19 is deliberately seeking a tactical advantage is inescapable.'" See Doc. 575 pg. 12-13 ln.
20 26-2. However, the two instances are highly dissimilar. First, in Taylor, the government
21 filed a discovery motion "well in advance" of the trial. *Taylor*, 484 U.S. at 400. The
22 defendant failed to identify a witness named Wormley even though Wormley was known
23 to the defense at the time. *Id.* Then on the second day of trial, defendant made an oral
24 motion to include Wormely as a witness after the prosecution's main witnesses had
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1 completed their testimony. *Id.* This is not analogous to the present issue. First, trial has
2 not yet started, and the government has not presented their case. It was the timing in
3 *Taylor* was the primary reason for the exclusion of Wormley as a witness. Second, the
4 issue of Wormley testifying was that the defense failed to disclose them upon request and
5 Wormley had been known as a witness at the time of the request. Here, we have
6 documents in question have only been disclosed in response to the governments
7 productions to rebut their incoming evidence. While the standard of *Taylor* is
8 undoubtedly applicable, the factual situation before this Court does not merit exclusion.
9 Furthermore, the 9th Circuit acknowledged that in *Taylor*, the Supreme Court suggested
10 that even if there is a discovery violation, a sanction other than preclusion will often be
11 adequate and appropriate. *Finley*, 301 F.3d at 1018.

12 **II. Kathleen Nicolaides**

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16 In October 2022, Counsel reviewed at the \$255 check that is the basis of the Carol
17 Hill mail fraud count of the Indictment amidst the entire group of checks in which it was
18 situated. After 50+ years in the business, it was clear that there were at least two
19 signatories on the checks. While they both appeared to be “David Harbour,” but they
20 appeared very different from one to other to my own eye.¹ Therefore, I sent a group of
21 checks to our document examiner and asked her to perform a forensic examination.

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23 I did not hear back from her for a while. Concerned, I reached out to her in early
24 December and learned to my dismay that her husband had suddenly died of a heart attack

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26 ¹ I first used forensic document examiners in prosecuting a murder case in 1973 at Fort
27 Meade, Maryland and have used them steadily throughout my practice both as an AUSA
28 and as a defense lawyer.

1 in October and that she had been unable to work, as one might expect, for all of
2 November into December.

3 The best I could do was to get a commitment that she would do the examination
4 and get me a result in mid-January. The day I got her report, I forwarded it to the
5 government. I would have liked for the government to have received it earlier just as I
6 would have liked to have received it earlier. The examination found that there are two
7 groups of checks bearing signatures that that are distinct from each other. One group
8 includes the signature appearing on the \$255 check for the benefit of Carol Hill and a
9 larger check written to her husband. These were not signed by the same person who
10 signed the large majority of the checks in the group. She cannot state that Carol Hill
11 signed them but can state that they are distinct from the majority of the checks that
12 Harbour indicated that he had signed. We got the report out as quickly as we could.
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16 The government, for both expert witnesses, relies on *United States v. Anderson* in
17 which Judge Bolton precluded an expert for untimely disclosure. *See* Doc. 575 pg. 7 ln.
18 8-19. However, as Judge Bolton wrote:

19 “One, there was no timely disclosure of Mr. Brown’s testimony or even his
20 existence. The email that you sent didn’t even – sometime just before trial didn’t
21 even disclose the identify of the individual that you were referring to.” *Id.* at ln.
22 14-16.
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25 The disclosure that occurred in *Anderson* is not similar to this situation. The
26 Defendant proved notice of expert Cathie Cameron as far back as 2020 (Doc. 95, filed on
27 June 15, 2020); Kathleen Nicolaides had also been used as an expert by the Defendant
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1 previously, and Defendant needed additional work completed only in response to
2 continued disclosures and updated case theories propounded by the government.
3 Furthermore, Ms. Nicolaides's name has been repeatedly given to the government as a
4 witness in this case and was disclosed on exchanged joint witness lists. In *Anderson*, the
5 defendant did not even provide a name. As Ms. Nicolaides has been used by the
6 Defendant before, the government cannot be permitted to play coy that they were
7 unaware of what Ms. Nicolaides was an expert in forensic document examination.
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9 **III. Cathie Cameron**

10 Ms. Cameron was designated as a defense forensic accountant at the outset of the
11 case. *See* Doc. 95. She had an early preliminary report done in June of 2022. However,
12 the government continually adjusted the focus of its accusations – this could be seen in
13 the motions – and this meant that the focus of the Cameron report also needed to shift.
14 The second problem was that, to this moment, the government has not complied with
15 Rule 16(G), F.R.Crim.P. and by that we mean with neither the version of the Rule that
16 was in force until December 1, 2022 nor, most especially, with the version of the Rule
17 that went into effect then. The government has never produced any report at all, merely a
18 series of flow-charts that meet none of the Rule 16 requirements. A separate motion to
19 strike the government forensic accountant is being filed today as well and its contents are
20 incorporated by reference as if fully set-forth herein.
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22 While the government contends that its forensic accountant will offer no opinions,
23 this is not true. The government's witness points to sources of funds and the disposition
24 of funds but the arrows themselves are laden with opinion. For example, why did the
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1 witness choose to select day “x” to examine the bank account when she could see that
2 funds had been received within a day or two of the disbursement of funds. This is hardly
3 unusual in a business.

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5 More importantly, it should be readily understood that, until the government’s
6 final report was received, the defense forensic accountant could hardly be expected to
7 produce a final report and, as suggested, it was not until January 30 that we understood
8 that there was not and had never been a Rule 16(G) expert report. Additionally, the final
9 government charts, if the court is going to allow the government to use them, were not
10 received until January 4, 2023.

12 The government next contends that Ms. Cameron should be excluded because her
13 opinions that this was not a fraud draw on the conclusion into Harbour’s state of mind,
14 which is an impermissible conclusion for an expert to make. As far as Ms. Cameron
15 would opine on the mental state of Harbour, it is understood that type of inference is
16 impermissible. However, the government’s reliance on *United States v. Cooper* is
17 misplaced. *See* Doc. 575 pg. 10 ln. 1-9. In *Cooper*, the defendant moved to preclude a
18 fraud conclusion by government experts. *United States v. Cooper*, 286 F. Supp. 2d 1283,
19 1292–93 (D. Kan. 2003) To conclude something is a fraud requires a finding that all of
20 the elements of fraud are met, which includes the mental state of the defendant. But to
21 conclude something is not a fraud merely requires a finding that one of the essential
22 elements of fraud is not present. If a *prima facie* case is not present, then it cannot
23 possibly be a fraud. Ms. Cameron will not testify as to the mental state of Harbor, period.
24 Harbour has been charged with wire fraud and mail fraud; if Harbour did not use
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interstate wire communications or mailings in furtherance of a scheme, there is no fraud.
See 18 U.S.C. 1334; 1341.

Conclusion

The government seeks to gut the defense case on every level the day prior to the trial. If this is permitted, the chance of the Defendant receiving a fair trial is non-existent. We have diligently provided the documents as they were identified and have made fewer recent productions (since November). The latest defense productions, the 9th and 10th, were prompted more than anything by the government's disclosures in December and January; they are a reaction to the government's affirmative action.

RESPECTFULLY SUBMITTED this 31st day of January 2023.

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CERTIFICATE OF SERVICE

I hereby certify that on January 31, 2023 I electronically transmitted the attached document to the Clerk's Office using the CM/ECF system for filing and for transmittal of Notice of Electronic Filing to the following CM/ECF registrants:

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